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No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD W. MURRAY, ACTING DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case involves application of the "cause and prejudice" standard formulated by this Court in *Wainwright v. Sykes,* 433 U.S. 72 (1977), to an appellate level procedural default. Notwithstanding Carrier's belated assertion to the contrary, the *Sykes* standard is fully applicable to such defaults. A showing of ineffective assistance of counsel is not the only way in which "cause" can be established, but when, as here, in an attempt to establish "cause," a federal habeas petitioner points to the errors or omissions of his attorney, he should not succeed unless his attorney's performance falls below the level of competence required by the Constitution. The contrary conclusion reached by the court below, together with its

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[1]Effective December 20, 1985, Edward W. Murray became Acting Director of the Virginia Department of Corrections, replacing Allyn R. Sielaff, who resigned.

conclusion that the exhaustion doctrine is inapplicable to this case, ignores the precedents of this Court and, if not reversed, threatens to render the States' procedural default rules meaningless.

ARGUMENT

1.

WAINWRIGHT V. SYKES APPLIES TO *APPELLATE* AS WELL AS TRIAL DEFAULTS.

Carrier acknowledged in the Court of Appeals below that the *Sykes* "cause and prejudice" standard applied "to a state procedural bar resulting from failure to raise an issue on appeal." (Carrier Fourth Circuit Brief 8-9). And, he did not take issue with that point in his Brief in Opposition to the Commonwealth's certiorari petition.

Now, for the first time, Carrier argues in his "Brief On Behalf Of Respondent" that *Sykes* should not apply to an *appellate* default.[2] But this Court "will not ordinarily consider" issues which were "neither raised before nor considered by the Court [below]." *Adickes v. S. H. Kress &*

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[2]Because Carrier filed a direct appeal to the Supreme Court of Virginia, the only default involved in the case at bar is failure to present his discovery issue on that appeal. *Fay v. Noia*, 372 U.S. 391 (1963), to whatever extent it was not overruled by *Sykes* and its progeny, does not support Carrier's argument. *Fay* concerned a failure of the defendant to file *any* direct appeal. As contrasted with the determination of which legal issues are the most viable to pursue on appeal, which is generally a matter for appellate counsel to assess, the question of whether or not to appeal is a personal one for the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). For cases indicating that *Fay* (if it now has any validity) is distinguishable on this basis, see, *e.g., Leroy v. Marshall*, 757 F.2d 94, 98-99 (6th Cir.), *cert. denied*, 106 S.Ct. 99 (1985); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 442 (3d Cir. 1982); *Forman v. Smith*, 633 F.2d 634, 640 n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). *See generally Lawrence v. Peyton*, 209 Va. 610, 614-615, 166 S.E.2d 277, 281 (1969) (where defendant indicates a desire to take an appeal, counsel must perfect an appeal). Any question of whether *Fay v. Noia*, limited to its facts, retains vitality, is not before the Court in the instant case.

Co., 398 U.S. 144, 147 n.2 (1970). "Non-jurisdictional defects. . .should be brought to [this Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari." *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2432 (1985) (emphasis in original). Nevertheless, Carrier's belated argument is without merit.

In *Reed v. Ross*, ___ U.S. ___, 104 S.Ct. 2901 (1984), this Court applied *Sykes* to an appellate default[3] which occurred in the North Carolina Supreme Court, stating:

> The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise *on appeal* the unconstitutionality of the jury instruction on the burden of proof.

104 S.Ct. at 2903 (emphasis added). Indeed, recognizing the State's interest in maintaining the integrity of its rules and proceedings and the finality of its judgments, this Court said:

> North Carolina's rule requiring a defendant initially to raise a legal issue *on appeal*, rather than on postconviction review, performs such a function. It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 147 (1970). This type of rule promotes not only the

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[3]In *Ross*, this Court concluded that the habeas petitioner had shown "cause" under *Sykes* for his appellate default. The Court found "cause" in that, at the time of Ross' direct appeal, an objection to the burden-shifting jury instruction was so novel that its legal basis was not reasonably available. 104 S.Ct. at 2910, 2912. Under North Carolina law at that time, a contemporaneous objection at trial was not necessary to preserve for appellate review a question involving jury instructions. 104 S.Ct. at 2906 n.4.

> accuracy and efficiency of judicial decision, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the *appellate court* is focused on his case. . . .

104 S.Ct. at 2907 (emphasis added).

Similarly, *Jones v. Barnes*, 463 U.S. 745 (1983), reflects *Sykes'* application to appellate defaults. There, this Court noted that it had no occasion to decide whether appellate counsel's "*refusal* to raise *requested* claims" on appeal, claims upon which his client has insisted, would constitute "cause" for petitioner's default under *Sykes*.[4] 463 U.S. at 754 n.7 (emphasis added); *see also id.* at 755. This certainly implies the applicability of *Sykes* to appellate defaults in general.

Furthermore, Justice Blackmun, in his concurring opinion in *Rose v. Lundy*, 455 U.S. 509 (1982), acknowledged the application of *Sykes* even to *post*-appeal defaults at state habeas proceedings. Observing that a state may adopt a rule directing habeas petitioners to present all their claims at one time, Justice Blackmun noted that "a prisoner's failure to adhere to that procedural requirement, absent cause and prejudice, would bar subsequent federal habeas relief on additional grounds," citing *Sykes* and other authority.[5] 455 U.S. at 525 n.2 (Blackmun, J., concurring).

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[4]Not only is there "no showing" (Carrier Brief 17) that Carrier insisted on the discovery issue being raised, no such *allegation* was ever made by him.

[5]The Commonwealth did not assert in the federal courts below that Carrier, in addition to defaulting on direct appeal, had defaulted at his state habeas proceeding by not alleging ineffective assistance of appellate counsel. Consistent with that position below, the Commonwealth has represented to this Court that it would not assert default under the state habeas statute if Carrier returns to the state court, because after Carrier's *pro se* state habeas proceedings were completed, Virginia abandoned the "farce and mockery" standard for judging effectiveness of counsel. (Comm. Brief 29 n.25).

Most of the United States Courts of Appeals which have determined the application of *Sykes* to a failure to raise particular claims on direct appeal have held that the *Sykes* standard controls.[6] Logic and this Court's recent pronouncements dictate application of *Sykes* to such defaults. Indeed, the four central factors identified in *Sykes*—finality of judgments, comity and federalism, accuracy of issue resolution, and integrity of the criminal trial process (*Sykes*, 433 U.S. at 89–93)—are applicable to appellate defaults as well as to those occurring at trial.

Finality of Judgments

As stressed in *Reed v. Ross*, a state rule requiring a defendant to raise his claims on direct appeal rather than in subsequent habeas corpus proceedings serves the interest of finality of judgments. It encourages litigation of all claims together promptly after the trial and while the case is under the focus of the appellate court. *Ross*, 104 S.Ct. at 2907.

In *United States v. Frady*, 456 U.S. 152 (1982), this Court considered the damage done when an inmate attacks his conviction after the appeal stage has passed. "Once the defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted. . . ." 456 U.S. at 165. With this in

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[6] *E.g., Forman v. Smith*, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *Cole v. Stevenson*, 620 F.2d 1055, 1059-1062 (4th Cir.) (en banc), *cert. denied*, 449 U.S. 1004 (1980); *Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981); *Evans v. Maggio*, 557 F.2d 430, 433-434 (5th Cir. 1977); *Leroy v. Marshall*, 757 F.2d 94, 97-99 (6th Cir.), *cert. denied*, 106 S.Ct. 99 (1985); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-361 (7th Cir. 1983) (en banc); *Myers v. State of Washington*, 646 F.2d 355, 357-358 (9th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 921 (1982); *Ford v. Strickland*, 696 F.2d 804, 816 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983). *See also Graham v. Mabry*, 645 F.2d 603, 606-607 (8th Cir. 1981) (indicating that *Sykes* applies to defaults except that *Fay* applies where the matter is a fundamental decision to be made personally by defendant, such as whether to appeal at all, whether to waive a jury, and whether to plead guilty).

mind, the Court noted that "a collateral challenge may not do service for an appeal." *Id.* at 166. *See also United States ex rel. Spurlark v. Wolff,* 699 F.2d 354, 359 and 361 (7th Cir. 1983) (en banc).

Comity and Federalism

The second factor of *Sykes*, comity and federalism, applies just as forcefully to state appellate procedures as it does to state trial procedures. "Unless the procedure itself raises due process concerns, a state has an obvious interest in having its *appellate* procedures maintained without circumvention in federal courts." *Forman v. Smith*, 633 F.2d 634, 639-640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (emphasis added).

In the context of a trial default, this Court has said that "[t]he state *appellate* courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle v. Isaac*, 456 U.S. 107, 129-130 (1982) (emphasis added). This observation also has validity regarding appellate defaults.

This Court has held that issuance of a federal habeas writ, where there has been a trial default, "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.* at 130. A similar toll is exacted if a default on the state appeal may be circumvented on federal habeas review. Even if the claim is presented on state habeas corpus, an appellate default leaves the state appellate court with the choice of ignoring its own procedural rules and allowing state habeas corpus to be used as a substitute for direct appeal, or enforcing its rule with the knowledge that the merits of petitioner's claim will nevertheless be decided by a federal habeas court.

Carrier's assertion that the Commonwealth has raised the specter of "a parade of convicted felons being set free" and that such a fear is based upon "the questionable assumption that state criminal trials are rife with constitutional error" (Carrier Brief 20) misinterprets the Commonwealth's position. The valid interest in comity and

federalism is not so much concerned with convicted state prisoners being *released* as a result of federal habeas proceedings as it is with the intrusiveness of federal review where the number of meritorious cases is, at best, marginal. (Comm. Brief 20 and n.18). The Commonwealth has never premised its argument upon an assumption that state criminal trials are rife with constitutional error. The statistics demonstrate that just the opposite is true. State criminal trials clearly are not rife with constitutional error, but state prisoners are "rife" with meritless constitutional claims which threaten to overwhelm and render ineffective the system designed to protect them. (*Id.* at 20 n.17).

Contrary to Carrier's assertion, the effect of affirming the decision below would not be "minuscule." (Carrier Brief 20). As the American Civil Liberties Union (ACLU) has made clear, it is their position that if a federal habeas petitioner alleges attorney error or omission as "cause" for a procedural default in state court, he will be entitled in most, if not all, instances to an evidentiary hearing in federal court. (ACLU Brief 38-39). There is no reason to believe, as Carrier asserts, that the Court of Appeals' ruling would be limited to those few cases where appellate counsel had raised a claim in the notice of appeal but had not addressed it in his brief. As a consequence, in almost every case in which the attorney of a convicted state prisoner pares down the number of claims which could be asserted on direct appeal, and as a result of that process one or more claims are abandoned, the prisoner will seek a federal evidentiary hearing if he subsequently attempts to resurrect one or more of the claims that were abandoned on direct appeal. At a minimum, federal fact finding would be required. Experience demonstrates that the filing of affidavits typically results in sharpened issues of fact which must be resolved at an evidentiary hearing. Viewed in conjunction with Carrier's contention that the exhaustion doctrine does not apply to an assertion of "cause" for a procedural default (Carrier Brief 9-11), the devastating impact of affirming the decision below is clear. As the Commonwealth has stated in its opening brief, no

longer would the state trial and direct appeal be the "main event," but rather the focus would shift to collateral proceedings in federal court. (Comm. Brief 17).

Accuracy

Sykes' third concern, accuracy, is highly relevant to a requirement that all issues be presented on direct appeal. *See Ross,* 104 S.Ct. at 2907. Because state remedies must be exhausted prior to federal habeas proceedings, state appellate review generally occurs much earlier. In the instant case, for example, Carrier's direct appeal was filed on October 19, 1977, four months after final judgment was entered by the state trial court, but his federal habeas petition was not filed until September 19, 1980. The lapse of time can have a major impact on both the availability and recollection of witnesses. *See Ross,* 104 S.Ct. at 2907; *Forman v. Smith,* 633 F.2d at 640. And there is no particular time frame within which a habeas corpus petition must be filed. Some are filed many years after the conviction and direct appeal.

Integrity of State Proceedings

Finally, there is the factor of the integrity of the state proceedings. That is, all issues should be fully litigated and developed in the state courts with no inducement for the defendant or his attorney to "sandbag," *i.e.*, withhold issues with the expectation of later submitting them to what may be perceived as a more favorable federal forum. And, "[c]ertainly, whatever the potential for abuse of the state proceeding by an attorney seeking a tactical advantage, this risk is as great at the appellate level as it is at the original trial." *Forman,* 633 F.2d at 640. In this context, the United States Court of Appeals for the Seventh Circuit, sitting en banc, recently observed:

> [W]e perceive that there is a tactical reason for a state prisoner not to present certain claims to the state courts on direct appeal that was not present when *Fay* was decided. In *Sumner v.*

> *Mata*, 449 U.S. 539 . . . (1981), the Court held that factual determinations made by a state appellate court are entitled to a presumption of correctness. In a claim such as ineffective assistance of counsel a state prisoner may believe that it is in his best interest not to present the issue to the state appellate court, which will make a factual determination shortly after the trial that will be entitled to a presumption of correctness, but rather to wait until memories have faded to present his claims to a federal court on a habeas petition.

United States ex rel. Spurlark v. Wolff, 699 F.2d at 361. Additionally, the defendant may wish to avoid the persuasive impact on the federal habeas court of well-reasoned opinions rendered by the state appellate judiciary.

Thus, Carrier's contention that "no attorney" would ever be guilty of "sandbagging" during the appellate process (Carrier Brief 19) is without merit. Under the approach of the Circuit Court below, "sandbagging" during the appellate process is virtually invited. The prisoner would have little, if any, reason to risk an adverse finding by the state appellate courts and the possible impact of 28 U.S.C. § 2254(d).

As the foregoing discussion makes clear, this Court has already applied the *Sykes* criteria to appellate level defaults. Furthermore, the bases for applying the *Sykes* test to appellate defaults are entirely sound. For these reasons, this Court should reject Carrier's belated attempt to render *Sykes* inapplicable to procedural defaults which occur on direct appeal.

2.

THE COMMONWEALTH IS NOT ASSERTING THAT ONLY INEFFECTIVE ASSISTANCE OF COUNSEL CAN CONSTITUTE *SYKES* "CAUSE."

Contrary to Carrier's characterization, the Commonwealth does not assert that as long as a defendant has

received Sixth Amendment effective assistance of counsel, any defaulted constitutional claim would be foreclosed. (Carrier Brief 22). There may be any number of acceptable forms of "cause." For example, this Court has held that where a claim is so novel that the tools were not available for counsel to have timely fashioned it in the state court, *Sykes* "cause" has been established. *Reed v. Ross*, 104 S.Ct. at 2910, 2912.[7] Other types of "cause" have been suggested by amici curiae. They include unreasonable refusal by the state court to entertain an objection, default resulting from incapacity or interference by officials, or some other impediment not attributable to the defendant or his lawyer that prevented assertion of the claim. (U.S. Solicitor General's Brief 16; Fla. A.G.'s Brief 28-29). By no means is the Commonwealth asking this Court "to sweep aside . . . the careful reasoning of Justice Rehnquist" in *Sykes*. (Carrier Brief 22). To the contrary, the Commonwealth fully embraces the reasoning of the *Sykes* opinion.

3.

THE RELIEF GRANTED WHEN THE *SYKES* TEST IS SATISFIED IS, IN EFFECT, NO DIFFERENT THAN THE RELIEF GRANTED WHEN THE *STRICKLAND* TEST IS SATISFIED.

Carrier contends that "cause" under *Sykes* based upon attorney error need not rise to the level of constitutional ineffective assistance of counsel. In support of this contention he asserts that relief for a Sixth Amendment violation is "quite different" from the type of relief granted under *Sykes*. (Carrier Brief 22). He argues that a finding of ineffective assistance of counsel "furnishes complete habeas relief, while *Sykes* is only a threshold prerequisite to

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[7]Contrary to the ACLU's suggestion (ACLU Brief 22, 47), this Court did not indicate in *Ross* that attorney error short of ineffective assistance of counsel could constitute "cause" under *Sykes*. "Resolution of [the novel issue] question turns not on the state of mind of the attorney, but on the state of the law at the time of trial, which is an objective external factor." (U.S. Solicitor General's Brief 20).

a determination of whether such relief is appropriate." (*Id.* at 23). Both Carrier and the ACLU assert that "prejudice" under *Sykes* and "prejudice" under *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), are separate and distinct, and that a habeas petitioner must meet a higher standard to demonstrate "prejudice" for purposes of a Sixth Amendment violation. (Carrier Brief 23 n.12; ACLU Brief 30).

All of these contentions are without merit. As the Commonwealth asserted in its opening brief, when a federal habeas petitioner seeks to excuse his procedural default in state court by pointing to the inadequacies or errors of his trial or appellate counsel, it is *Strickland* which should provide the analytical framework. (Comm. Brief 14). The nature of our adversary system simply demands that, unless ineffective assistance of counsel is demonstrated, the errors or omissions of trial or appellate counsel must be binding upon a convicted criminal defendant.[8] (Comm. Brief 14-19).

Furthermore, contrary to the assertions of Carrier and the ACLU, the analyses under *Sykes* and *Strickland* are not entirely separate and distinct.[9] Consistent with both *Sykes* and *Strickland*, this Court could hold that, if attorney error is asserted as "cause" for a procedural default in state court, the federal habeas petitioner must demonstrate that counsel's performance was objectively deficient, *i.e.*,

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[8]The contrary conclusion reached by the court below has led to confusion in the federal district courts. *See Giarratano v. Procunier*, C.A. No. 83-185-N, slip op. at 9 n.6 (E.D. Va. Oct. 1, 1985) ("The *Carrier* case. . .leaves federal trial courts in this circuit in a quandary..."). (A copy of this unpublished opinion has been lodged in the Clerk's Office of this Court).

[9]Even the Court of Appeals below acknowledged that if the attorney's omission was a deliberate tactical decision, the habeas petitioner "must show that counsel's particular decision amounted to a breach of the Sixth Amendment in order to overcome the *Wainwright* [*v. Sykes*] bar." 724 F.2d 396, 401 (4th Cir. 1983). Obviously, the Circuit Court does not consider a *Sykes* analysis to be totally distinct from an analysis under the Sixth Amendment.

"that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 104 S.Ct. at 2064.

While acknowledging that a single error of counsel may provide the basis for relief under the Sixth Amendment, *see United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 2046 n.20 (1984), the ACLU asserts that equating *Sykes* "cause" with the performance prong of *Strickland* will encourage habeas petitioners to assert that isolated errors by counsel are sufficient to establish Sixth Amendment violations. (ACLU Brief 28). Not surprisingly, the ACLU offers no statistical support for this assertion. Anyone who is familiar with the federal habeas petitions of state prisoners knows that such prisoners need no incentive whatsoever to allege that even the most insignificant error or omission by counsel is sufficient to constitute a Sixth Amendment violation.

In support of their contentions that "prejudice" under *Sykes* is different from "prejudice" under *Strickland*, both Carrier and the ACLU rely upon *Reed v. Ross*, 104 S.Ct. at 2908. That reliance, however, is misplaced. While it is true that in *Ross* this Court stated that if Ross' jury had not been improperly instructed on the allocation of the burden of proof "he might not have been convicted of first-degree murder," the State of North Carolina had already conceded both in this Court and the lower federal courts that Ross had suffered "actual prejudice" under *Sykes*. *Ross*, 104 S.Ct. at 2908. This Court thus had no occasion in *Ross* to define the concept of *Sykes* "prejudice." *Ross* was concerned entirely with the "cause" prong of the *Sykes* standard.

In *United States v. Frady*, however, this Court discussed *Sykes* "prejudice" at length, and it is clear that "prejudice" under *Sykes* is at least as stringent a standard as "prejudice" under *Strickland*. In the context of a failure to object to an ailing jury instruction, which incidentally was the same type of error as in *Ross*, "prejudice" is not

demonstrated unless the erroneous instruction so infected the entire trial that the resulting conviction violates due process. *Frady*, 456 U.S. at 169. The Court found no *Sykes* "prejudice" in *Frady* because there was "no risk of a fundamental miscarriage of justice," 456 U.S. at 172, and "no substantial likelihood the erroneous . . . instructions prejudiced Frady's chances with the jury." 456 U.S. at 174.

"Prejudice" under *Strickland* has been explicitly defined by this Court as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," and "a court making the prejudice inquiry must ask if . . . the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. at 2068, 2069. Thus, in both *Frady* and *Strickland*, this Court defined "prejudice" in terms of a reasonable (substantial) likelihood (probability) that if the asserted error had not been committed, the outcome of the proceeding in question would have been different.

That *Sykes* "prejudice" must rise at least to the level of *Strickland* "prejudice" is demonstrated by a simple observation. After reviewing the great bulk of the relevant cases, the Commonwealth is unaware of even a single case where a federal court has found that a habeas petitioner had demonstrated both "cause" and "prejudice" under *Sykes*, but was nevertheless refused habeas relief. Thus, Carrier's claim that the relief granted for satisfying the *Strickland* test is different and far greater than the relief granted for satisfying the *Sykes* test is a hollow one. A finding of "cause" and "prejudice" under *Sykes* is far more than a mere threshold inquiry. For all intents and purposes, if a habeas petitioner is able to satisfy *Sykes*, he is thereby able to obtain the very same relief that he would have obtained by demonstrating ineffective assistance of counsel.

4.

THE EXHAUSTION DOCTRINE IS APPLICABLE TO ASSERTIONS OF "CAUSE" AND IN THIS CASE THERE IS AN AVAILABLE STATE REMEDY ON THE ISSUE OF WHETHER RESPONDENT CAN SHOW "CAUSE" UNDER STATE LAW FOR HIS PROCEDURAL DEFAULT ON DIRECT APPEAL.

In the brief amici curiae filed in support of Carrier, the ACLU stated:

> If in the case at bar the warden [petitioner] means only that the prisoner [respondent] should be asked to employ available and effective state court opportunities to persuade the state courts to overlook his attorney's default, then we can identify no threat to the congressional plan for protecting Mr. Carrier's genuine interests.
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> * * *
>
> [W]e are reconciled to the view that a prisoner whose substantive federal claim appears to be procedurally barred under state law may be called upon to present to the state courts, by reasonably identifiable means, a state law basis for overlooking default and reaching the merits. This appears to be the core lesson to be drawn from *Pitchess* [*v. Davis*, 421 U.S. 482 (1975)].
>
> * * *
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> State law may well recognize exceptions to the ordinary forfeiture sanction in circumstances which mirror those associated with "cause" in federal habeas. The issue in state court is, however, one of state law alone.

(ACLU Brief 56-58).

The ACLU has correctly identified the Commonwealth's position with respect to the exhaustion issue. At no time

has the Commonwealth ever advocated that Carrier must return to state court so that the state courts be given the opportunity to determine whether he can demonstrate *Sykes* "cause" for his procedural default on direct appeal. What the Commonwealth does advocate is that the state courts must be given the opportunity to determine, as a matter of state law, whether there is "cause" to excuse Carrier's procedural default, *i.e.*, whether there is, in fact, an enforceable procedural default under state law.

While the ACLU takes no position as to whether any state remedies remain available in this case (ACLU Brief 58),[10] Carrier contends that no state remedies are available to him and that any effort to exhaust at this point would be futile. (Carrier Brief 11-16). His contention, however, appears to be based upon a misapprehension of both the Commonwealth's position and Virginia law.

Contrary to Carrier's assertion (Carrier Brief 11-12), the Commonwealth has never maintained, nor does state law allow, that a petitioner for a writ of habeas corpus in Virginia "may raise . . . only those issues which meet the requirement of Virginia Supreme Court Rule 5:21." In fact, just the opposite is true. Under Virginia law, a claim which could have been raised at trial and on appeal generally cannot be raised in a habeas corpus proceeding, *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and a claim which was, in fact, raised at trial and on appeal normally cannot be relitigated in a habeas corpus proceeding. *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970). Habeas corpus cannot be used as a substitute for an appeal. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969).

Virginia's contemporaneous objection rule is irrelevant to the issue of whether there remains an available state

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[10]The ACLU notes, however, that the district court, by virtue of its familiarity with Virginia law, would be in the best position to determine if state remedies remain available. (ACLU Brief 61). The Commonwealth agrees. The fact of the matter, however, is that the district court has already determined that there is an available state remedy in this case. (Pet. App. 28 n.*; R.I. tab 13).

remedy in this case except to the extent that the rule and its exception for "good cause" and the "ends of justice" have been applied in the context of the rule of *Parrigan* by the Supreme Court of Virginia.[11] The contemporaneous objection rule only purports to define which issues can be raised *on appeal*. The question before this Court with respect to the exhaustion issue is whether Carrier still has an available state remedy *on habeas corpus*. It is the rule of *Parrigan* to which the Court must look for the answer to that question.

In *Parrigan*, the Virginia Supreme Court held that "when a prisoner has been afforded a *fair and full opportunity* to raise and have adjudicated [his claim] . . . in his trial *and upon appeal*,"[12] habeas corpus review is not available except for jurisdictional defects. 215 Va. at 29, 205 S.E.2d at 682 (emphasis added). The Court also found that inmate Parrigan was not entitled to consideration of

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[11]As Carrier points out (Carrier Brief 13 n.5), Rule 5:21, which was in effect at the time of his procedural default on appeal, has now been divided into Rules 5:17 and 5:25. While Rule 5:17 pertains to appellate defaults such as Carrier's, it specifically incorporates Rule 5:25, with its "good cause" and "ends of justice" exception, to define the limits of what questions may be litigated on appeal *when they are not raised in the petition for appeal.*

Furthermore, the Virginia Supreme Court, in applying *Parrigan*, has cited that case in conjunction with the state contemporaneous objection rule. *See Coppola v. Warden*, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981).

[12]Carrier's contention that there is no exception under Virginia law for a procedural default on appeal (Carrier Brief 14) is without merit. *Parrigan*, by its very terms, applies to claims which could have been raised at "trial and upon appeal" but were not so raised. Thus, *Parrigan* and its exceptions apply not only to claims which were not raised at trial, but also to claims such as Carrier's which were raised at trial but were not raised on appeal. *See Parrigan*, 215 Va. at 30, 205 S.E.2d at 682. *See also Superintendent v. Hayes*, 215 Va. 122, 207 S.E.2d 823 (1974); *Superintendent v. Jackson*, 215 Va. 251, 208 S.E.2d 739 (1974). The Supreme Court of Virginia, in unpublished habeas corpus decisions, has consistently applied *Parrigan* to procedural defaults which occur solely at the appellate level. *See, e.g., Johnson v. Warden*, Record No. 841684 (March 5, 1985) (copy lodged with the Clerk's Office).

his claim for the first time on habeas corpus "absent a showing of ineffective assistance of counsel in failing to raise that question."[13] *Id.*

Thus, in the case at bar, Carrier has an available state remedy which he has never attempted to exhaust. Contrary to his assertion in this Court (Carrier Brief 14), Carrier has not "made every reasonable effort to exhaust" state remedies. In answer to Carrier's state petition for a writ of habeas corpus, the Commonwealth filed a motion to dismiss which not only pointed out Carrier's procedural default on direct appeal, but also cited *Parrigan* and invited from Carrier an explanation for that default. (R.I. tab 13). Carrier, however, never furnished the Virginia courts with such an explanation.[14]

The fact that Carrier did not have counsel in his state habeas proceedings does not excuse his failure to proffer an explanation for his default. Carrier also did not have counsel in federal district court, but that fact did not pre-

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[13]This is not to say that ineffective assistance of counsel is the only "cause" for a procedural default under Virginia law. In other contexts, where the habeas petitioner does not assert attorney error as "cause," there may well be other types of "cause." *See DiPaola v. Riddle*, 581 F.2d 1111, 1114 (4th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (*Parrigan* does not foreclose claims "which, for good reasons, could not have been asserted earlier"). Indeed, the Virginia Supreme Court in *Parrigan* specifically couched its holding in terms of habeas review being foreclosed where the prisoner had "a fair and full opportunity" to raise and adjudicate his claim at trial and on appeal. But where, as here, the habeas petitioner asserts attorney error as his excuse, the alleged deficiency must rise to the level of ineffective assistance of counsel.

[14]Incredibly, Carrier seems to suggest that the state courts should have afforded him an evidentiary hearing before dismissing his petition for procedural default. (Carrier Brief 19 n.6). It is elementary, under both federal and state law, that a habeas petitioner is not entitled to an evidentiary hearing unless he alleges facts which, if true, would entitle him to relief. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968). Even a cursory review of Carrier's state habeas pleadings demonstrates that he not only alleged insufficient facts to warrant a hearing on the issue of procedural default, but no facts whatsoever.

vent him from asserting that he was not to blame for his procedural default and that he had been victimized by "ineffective assistance of counsel." (J.A. 10-11). Even in his brief filed in this Court, Carrier has refused to abandon a claim that he was denied his Sixth Amendment right to the effective assistance of counsel and has stated that the claim "remains to be determined by the finder of fact upon remand." (Carrier Brief 23 n.13). This is the very type of "cause" which *Parrigan* expressly recognized could excuse a procedural default under Virginia law. If Carrier had made such an explanation in state court and the state courts had nevertheless dismissed his petition, he would be correct in asserting that state remedies have been exhausted. Having failed to give the state courts the opportunity to determine whether, under state law, there is a valid excuse for his procedural default, however, Carrier's claim of exhaustion is an empty one.

Finally, despite the Commonwealth's representation that if Carrier is made to return to State court the Commonwealth will not assert Va. Code § 8.01-654(B)(2) as a procedural bar (Comm. Brief 29 n.25), Carrier claims that no state remedy is available because there is "no assurance" that the Virginia courts will not apply the statutory bar nevertheless. (Carrier Brief 16). But this Court need not find such an "assurance" as a predicate to requiring Carrier to exhaust his state remedies.

While it is true that, in appropriate circumstances, it may be found that a further attempt to exhaust state remedies would be futile, *see Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982), such futility should not be found where there is "a reasonable *possibility* that an exception to the [state procedural] bar is available." *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983) (emphasis added), *citing Santana v. Fenton*, 685 F.2d 71 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).[15]

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[15]In *Engle v. Isaac*, this Court agreed with both lower federal courts, which were thoroughly familiar with Ohio law, that no state remedies remained available. 456 U.S. at 125 n.28. In the present case, a finding

In the case at bar, there is at least "a reasonable possibility" that § 8.01-654(B)(2) will not be applied by the Virginia courts to bar Carrier from habeas relief. As was set forth at length in the Commonwealth's opening brief (Comm. Brief 29 n.25), the particular facts of this case, as well as the fact that the Commonwealth will not assert the statute as a defense,[16] make it quite likely that the state courts will not apply the statute to Carrier. The federal district courts in Virginia, in the absence of a ruling by the state courts that the statute bars relief, have been unwilling to hold that the statute allows for no exceptions and that its very existence renders futile a return to state court for a second habeas proceeding. *See, e.g., Jones v. Booker*, C.A. No. 84-0439-R, slip op. (E.D. Va. Nov. 21, 1984); *Murdock v. Virginia*, C.A. No. 83-431-N, slip op. (E.D. Va. Jan. 17, 1984) (Copies of these unpublished decisions have been lodged in the Clerk's Office of this Court).

Carrier has conceded that, if this Court decides that an assertion of attorney error as *Sykes* "cause" must rise to the level of ineffective assistance of counsel, he must re-

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by this Court that no state remedies remain available would be contrary to the finding of the district court that a state remedy is available.

In both *Richardson* and *Santana*, the federal courts found that unlike the situation in *Engle v. Isaac*, where the Ohio procedural bar "clearly applied," there was "a reasonable possibility" that the procedural bars of North Carolina and New Jersey, respectively, would not be applied to bar relief. *Richardson*, 716 F.2d at 1062; *Santana*, 685 F.2d at 75.

[16]In its brief amici curiae, the ACLU expressed concern that if Carrier is made to return to state court and the state courts nevertheless apply § 8.01-654(B)(2) to bar relief, Carrier will be met with a two-fold procedural default defense when he returns to federal habeas. (ACLU Brief 59 n.14). Thus far in Carrier's federal habeas proceedings, the Commonwealth has not asserted the statute as a defense because the Commonwealth does not believe that the statute should be applied to the particular facts of his case. If, upon a return to state court, the statute is applied to bar relief, the Commonwealth will not attempt to benefit from Carrier's unsuccessful return to state court, and will not assert his procedural default under § 8.01-654(B)(2) as an additional defense if Carrier subsequently returns to federal court for relief.

turn to state court because he has failed to exhaust state remedies.[17] (Br. Opp. 4). Even if this Court were to decide that attorney error need not rise to the level of ineffective assistance of counsel in order to constitute "cause," the facts of this case demonstrate that a state remedy remains available to Carrier. For these reasons, this Court should vacate the decision of the court below and direct that the case be remanded to the district court with instructions to dismiss.

CONCLUSION

The Commonwealth of Virginia urges the Court to reject Carrier's belated attempt to render the *Sykes* standard inapplicable to appellate level procedural defaults. While ineffective assistance of counsel is not the only type of *Sykes* "cause," a habeas petitioner cannot demonstrate such "cause" by pointing, as Carrier has done, to the alleged errors of his attorney unless the attorney's performance falls below the level demanded by the Constitution. Affirmance of the Fourth Circuit's ruling to the contrary would adversely affect the criminal justice system as a whole with little or no resultant benefit to habeas petitioners. Finally, because a remedy under state law remains available to Carrier concerning his claim of attorney error, he has failed to comply with the exhaustion requirement of 28 U.S.C. § 2254.

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[17]This concession implicitly recognizes, contrary to Carrier's assertions elsewhere, that the exhaustion doctrine is, in fact, applicable to assertions of "cause" cognizable in state court.

Respectfully submitted,

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